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No. 93-830

In the Supreme Court of the United States

OCTOBER TERM, 1993

DAVIS SUPERMARKETS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by continuing a civil trespass action against a union after the Board's General Counsel had issued a complaint alleging that the union's conduct was protected by the Act.

2. Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) of the Act by discriminatorily refusing to permit employees who supported one union to picket or handbill on its property, while granting access to representatives of a rival union and other groups.

3. Whether the Board reasonably concluded that 11 employees who worked at petitioner's Greensburg store, but were assigned on a part-time or a temporary basis to its Hempfield store, should not be included in the Hempfield bargaining unit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 2 F.3d 1162. The decision and order of the National Labor Relations Board (Pet. App. 37a-52a) and the decision of the administrative law judge (Pet. App. 53a-211a) are reported at 306 N.L.R.B. 426

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1993. The petition for a writ of certiorari was filed on November 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owns and operates supermarkets in Greensburg and Hempfield Township, Pennsylvania. Employees working at petitioner's Greensburg store are represented by the United Steelworkers of America (Steelworkers). In March 1986, Local 23, United Food and Commercial Workers International Union (Local 23), launched a campaign to organize employees working at the Hempfield store, who were not then unionized. By April 19, 13 Hempfield employees had signed authorization cards for Local 23. On that date, petitioner summarily laid off six of them. On May 1, Bob Davis, chairman of petitioner's board of directors, held two separate meetings with employees at the Hempfield store, telling those assembled that he wanted them to sign authorization cards for the Steelworkers. After those meetings, Steelworkers officials and Greensburg employees distributed Steelworkers' authorization cards and copies of the Steelworkers' labor contract covering the Greensburg store. In May, petitioner discharged two more employees who had signed authorization cards for Local 23. Pet. App. 2a-4a.

Despite petitioner's conduct, Local 23 concluded that it had attained majority support among the Hempfield employees. On May 2, Local 23 filed a petition with the National Labor Relations Board (Board) for a representation election. On May 13, Local 23 made a continuing request to petitioner to commence bargaining. By May 24, a majority of the Hempfield employees (58 of 109) had signed authorization cards for Local 23. Petitioner, however, refused to bargain with Local 23. Pet. App. 4a, 44a n.10, 91a, 205a.

On May 23, Local 23 protested petitioner's actions by picketing on the sidewalk in front of the Hempfield store.

Twelve picketers, six of whom were employees of petitioner, distributed handbills to customers and carried signs requesting customers not to patronize the store because petitioner "has committed unfair labor practices designed to deny employees their rights under the [National Labor Relations Act]." Pet. App. 30a, 39a, 102a n.64. The same day, May 23, petitioner filed a civil trespass action against Local 23 in state court, seeking an injunction prohibiting the picketers from entering the Hempfield store property. *Id.* at 105a & n.69. On May 28, the state court issued an injunction that barred Local 23 from all picketing and handbilling on petitioner's property, but permitted three picketers to station themselves off petitioner's property at each of two entrances to the parking lot and to offer handbills to customers there. *Id.* at 41a, 109a.

On June 2, Local 23 filed an unfair labor practice charge with the Board challenging petitioner's refusal to allow employees to picket and engage in other concerted activities on its property. Pet. App. 109a-110a. On July 22, petitioner called the state police in response to resumed efforts by picketers to picket on petitioner's property. Local 23, fearing a loss of employee support, requested cancellation of the representation election, which had been scheduled to take place on July 25, and the Board granted the request. *Id.* at 4a, 5a, 41a-42a.

On July 25, the Board's General Counsel issued a complaint against petitioner based on Local 23's unfair labor practice charge. The complaint alleged that petitioner violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), by denying Local 23 access to the Hempfield store property and by maintaining its civil trespass suit in state court to enjoin Local 23 from

picketing there.[1] Pet. App. 41a. Despite the General Counsel's issuance of the unfair labor practice complaint, petitioner continued to exclude picketers from its Hempfield property by seeking enforcement of the state court's injunction. On August 2, a deputy sheriff handed picketers a document that indicated that they were not allowed to enter the parking lot. When a number of laid-off employees resumed picketing on the sidewalk in front of the store, petitioner, on November 26, obtained an order from the state court directing Local 23 and those picketers to show cause why they should not be held in contempt of the injunction. *Id.* at 5a, 42a, 122a-123a.

2. a. After a hearing, the Board's administrative law judge (ALJ) concluded that petitioner violated Section 8(a)(1) of the Act, by discriminatorily refusing to permit Local 23 to picket and handbill on the Hempfield property while permitting other organizations access to the property for the purpose of soliciting its customers. Pet. App. 203a. In so concluding, the ALJ credited the testimony of witnesses that established that petitioner routinely allowed a variety of groups to solicit customers on the sidewalk in front of the store. *Id.* at 175a.[2]

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[1] Shortly thereafter, on July 29, Local 23 filed a motion in state court for dismissal of petitioner's trespass suit on the ground that it was preempted by the issuance of the General Counsel's unfair labor practice complaint. The court denied Local 23's motion, opining that "[i]f the effect of [f]ederal [l]aw is to preempt this Court's action, then such preemption should be pursued through the [f]ederal system." Pet. App. 120a.

[2] For example, employee Defibaugh testified that on May 23, the first day of picketing, several individuals had set up a table on the sidewalk in front of the store and were selling raffle tickets to raise money for an organization. She also testified that, around holidays, there were usually church groups or school organizations in front of the store selling tickets or other items. Pet. App. 104a-

The ALJ also concluded that petitioner violated Section 8(a)(1) by maintaining its trespass suit against Local 23 in state court. Pet. App. 203a. The ALJ determined that, although petitioner's "filing of the trespass action, in and of itself" was not unlawful, "maintaining the trespass action * * * [after Local 23] filed a charge and a complaint was issued by the Board is another matter." *Id.* at 179a. The ALJ explained that Section 7 of the Act, 29 U.S.C. 157, "gives employees the right to picket their own employer at the primary location," and found that some of the individuals who stationed themselves in front of the Hempfield store on the first day of picketing were in fact petitioner's own employees. Pet. App. 178a-179a. The ALJ then observed that, under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the Act preempts state-court jurisdiction over a lawsuit when activity at issue is "arguably protected" by Section 7. *Id.* at 180a-181a.[3] Because the General Counsel's complaint and petitioner's state court action involved the same controversy, the ALJ concluded that, once the General Counsel's complaint issued, "[s]tate jurisdiction was pre-empted." *Id.* at 183a, 185a n.118. The ALJ rejected petitioner's contention that it was authorized to pursue its lawsuit under *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983). The ALJ concluded that *Bill Johnson's* does not assist petitioner, because its lawsuit was preempted by the Act and had been

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105a. Employee Harshell corroborated Defibaugh's testimony. *Id.* at 105a n.68.

[3] In *Garmon*, this Court held that "[w]hen an activity is arguably subject to [Section] 7 or [Section] 8 of the Act, the States * * * must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245.

maintained for a retaliatory purpose.[4] Pet. App. 183a-184a.

In addition to the foregoing violations of Section 8(a)(1), the ALJ found that petitioner had committed numerous other unfair labor practices during the course of Local 23's organizing campaign at the Hempfield store. Pet. App. 202a-205a.[5] To remedy petitioner's violations of the Act, the ALJ applied *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), and stated that, "[i]n view of the degree and pervasiveness of the unfair labor practices," it was necessary for the Board to order petitioner to bargain with Local 23, since "the holding of a fair election is no longer possible." Pet. App. 201a. The ALJ found that a majority of the Hempfield employees had signed authorization cards for Local 23 in May 1986, and that "[i]t is obvious that [petitioner] intended by its unlawful conduct to dissipate [Local 23's] majority status." *Id.* at 199a-

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[4] In *Bill Johnson's*, the Court held that the Board can enjoin as an unfair labor practice a lawsuit that was "filed with [a] retaliatory intent" only if the lawsuit has no "reasonable basis." 461 U.S. at 749. The Court stated that this rule applied when the lawsuit was one that "federal law would not bar except for its allegedly retaliatory motivation." *Id.* at 737 n.5. The Court emphasized, however, that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law." *Ibid.*

[5] For example, the ALJ found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by laying off six employees in April 1986, and that petitioner violated Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), by urging Hempfield employees to join the Steelworkers and by otherwise rendering aid and assistance to the Steelworkers. The Board affirmed these unfair labor practice findings, which were upheld by the court of appeals, Pet. App. 6a-13a, 27a-28a, 38a-39a, 38a n.3, and no issue involving them is presented here.

200a, 202a. In determining that Local 23 had achieved majority status in May, the ALJ excluded from the Hempfield bargaining unit 11 employees, who worked at both the Greensburg and the Hempfield store, because they did not share a sufficient community of interest with the Hempfield employees. *Id.* at 189a-191a.

b. The Board affirmed the ALJ's unfair labor practice findings and adopted his bargaining order. Pet. App. 38a. The Board agreed with the ALJ that petitioner violated Section 8(a)(1) by its "disparate treatment of protected union activity" in granting access to the Hempfield store property. *Id.* at 41a. The Board explained that an employer may not bar access when it "discriminate[s] against the union by allowing other distribution" on its property. *Id.* at 40a (quoting *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). In this case, the Board found sufficient evidence that petitioner had engaged in antiunion discrimination. *Id.* at 40a-41a.[6]

The Board also agreed with the ALJ that petitioner violated Section 8(a)(1) by maintaining its civil trespass suit against Local 23 after the General Counsel had issued an unfair labor practice complaint on July 25, 1986. The Board explained that its rule, as stated in *Loehmann's Plaza*, 305 N.L.R.B. 663 (1991), is that once the General Counsel issues a complaint "alleging the unlawful exclusion of employees or union representatives from an employer's property, any state court lawsuit

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[6] In agreement with the ALJ, the Board observed that, both before and during the time that Local 23 sought to picket in front of the Hempfield store, petitioner "allowed other organizations unlimited access to its property for sales and solicitations." Pet. App. 40a. The Board also noted that petitioner had allowed the Steelworkers to utilize its facility for union organizing purposes. *Id.* at 40a-41a n.5.

concerning the question is preempted by the Board's proceedings and the continued pursuit of such a lawsuit violates Section 8(a)(1)." Pet. App. 42a.

The Board also agreed with the ALJ that, in considering whether Local 23 had attained majority status among the Hempfield employees (for purposes of determining whether a *Gissel* bargaining order should issue), the 11 employees who worked at both the Greensburg and Hempfield stores should, under all of the circumstances, be excluded from the Hempfield bargaining unit. The Board observed that those 11 employees spent the majority of their time working at the Greensburg store, and remained under the primary supervision of their Greensburg supervisors when working at the Hempfield store; moreover, they were members of the Greensburg bargaining unit and were expressly covered by the collective bargaining agreement in effect between petitioner and the Steelworkers. Pet. App. 44a.

3. The court of appeals affirmed the Board's unfair labor practice findings and enforced its bargaining order. Pet. App. 1a-36a. The court agreed with the Board that petitioner had discriminatorily denied employee supporters of Local 23 access to its property in violation of Section 8(a)(1). Pet. App. 32a. The court observed that "six of the twelve pickets who began their protest on May 23 were unquestionably 'employees' under the Act," and it concluded that the Board was "clearly correct" in treating their picketing as subject to the requirement that the employer's access rules "not discriminate against the union by allowing other distribution." *Id.* at 30a, 31a. The court of appeals noted that petitioner's discriminatory behavior was "particularly egregious," since petitioner had invited at least three Steelworkers representatives inside the store to recruit employees and to distribute authorization cards and contracts, while at the

same time denying employees access to property outside of the store. *Id.* at 31a.

The court of appeals also agreed with the Board that petitioner violated Section 8(a)(1) by maintaining its trespass action in state court after the issuance of the General Counsel's unfair labor practice complaint. Pet. App. 36a. The court of appeals upheld the Board's rule in *Loehmann's Plaza*, namely, that an employer's state-court trespass action is preempted when the Board's General Counsel has filed a complaint, thus indicating that the conduct challenged by the employer is arguably protected by the Act and affording a forum before the Board for resolution of the legality of the trespass under federal labor law. Pet. App. 33a-36a. The court rejected petitioner's contention that, under *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380 (1986), the General Counsel's issuance of a complaint does not establish that the disputed conduct is "arguably protected" by the Act. Pet. App. 35a. In light of the investigation that the General Counsel conducts and the requirement that a complaint issue only if a charge appears to have merit, the court of appeals held that the Board reasonably holds that the issuance of a complaint establishes that the underlying conduct is arguably protected for preemption purposes. *Id.* at 36a.

Finally, the court of appeals upheld the Board's issuance of a *Gissel* bargaining order. In so holding, the court of appeals sustained the Board's finding that Local 23 had attained majority status in the Hempfield bargaining unit. The court rejected petitioner's claim that, for the purpose of determining whether majority status existed, the Board was required to include the 11 employees who worked at both the Greensburg and Hempfield stores in the Hempfield bargaining unit. Pet. App. 19a. The court agreed with the Board that those employees

were primarily associated with the Greensburg facility and that all 11 were already represented by the Steelworkers. *Id.* at 18a-19a.

ARGUMENT

1. Petitioner contends (Pet. 12-18) that the Board's rule in *Loehmann's Plaza*, 305 N.L.R.B. 663 (1991), conflicts with this Court's decisions in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983); *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978); and *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380 (1986). There is no merit to that contention.

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959), this Court established that "[w]hen an activity is arguably subject to [Section] 7 * * * of the Act, the States * * * must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." The Board in *Loehmann's Plaza* applied that principle by holding that preemption of state-court jurisdiction over trespass disputes involving picketing or handbilling occurs when the Board's General Counsel "issues [a complaint] * * * concerning the same activity." 305 N.L.R.B. at 671. The Board explained that "when the General Counsel issues a complaint, he has made a determination, pursuant to his 'final authority' under Section 3(d) of the Act [29 U.S.C. 153(d)] * * * that the union picketing or handbilling is arguably protected by the Act." *Id.* at 670. Pursuit or maintenance of a trespass action after the General Counsel's issuance of a complaint violates Section 8(a)(1) of the Act, because it seeks to enjoin or punish arguably protected activity. *Id.* at 671. Accordingly, the party that filed the trespass suit may be in violation of Section

8(a)(1) unless it seeks to stay the state-court proceeding, and to vacate any injunction that the state court may have issued, within seven days of the issuance of the General Counsel's complaint. *Ibid.*

Petitioner errs in suggesting that the Board's rule conflicts with this Court's cases. In *Bill Johnson's Restaurants*, the Court affirmed the Board's authority to enjoin, as an unfair labor practice under Section 8(a)(1) of the Act, a lawsuit that was "filed with [a] retaliatory intent," provided that the lawsuit has no "reasonable basis." 461 U.S. at 749. The Court emphasized, however, that "what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation," and it added that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption." *Id.* at 737 n.5. Accordingly, if a lawsuit is one over which the state courts lack jurisdiction because of *Garmon* preemption, the standard set forth in *Bill Johnson's* does not require the contrary result from the one reached in this case; the Board may enjoin the suit without regard to the nature of the litigant's motivation for initiating it, or the sufficiency of the basis supporting it.

In *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, the Court held that the Board's jurisdiction does not preempt a state court trespass action if the union does not file an unfair labor practice charge with the Board, for otherwise the employer would be left with no forum in which to adjudicate the issue of whether the union had a federal right to remain on the property. 436 U.S. at 200-208. The Court did not settle, however, the time at which preemption is triggered if a

union does file an unfair labor practice charge.[7] The *Loehmann's Plaza* rule, by establishing the General Counsel's issuance of a complaint as the event that triggers preemption of state-court jurisdiction over trespass suits, is consistent with *Sears*. The General Counsel's filing of a complaint occurs *after* the submission of a charge, and, by invoking the Board's jurisdiction, it provides a federal forum for resolution of the Act's application to the alleged trespass.

In *International Longshoremen's Ass'n* v. *Davis*, the Court stated that "[i]f the word 'arguably' [protected by the Act] is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor." 476 U.S. at 395. Petitioner contends (Pet. 17-18) that the General Counsel's filing of a complaint constitutes a "mere allegation" of a violation and therefore does not meet the standard articulated in *Davis*. The General Counsel's decision to file a complaint, however, follows an investigation of the charges filed by a private party and reflects the conclusion "that the charges have merit." *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 119 (1987). Those procedural requirements ensure that the basis for filing a complaint is not merely a private party's claim that the Board should assert jurisdiction. Against that background, the court of appeals correctly concluded that

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[7] In a concurrence, Justice Blackmun suggested that preemption should be found upon the filing of a charge. 436 U.S. at 209 (Blackmun, J., concurring). In response to that suggestion, Justice Powell filed a concurrence indicating disagreement with that view. *Id.* at 212-213 (Powell, J., concurring). The Court, however, did not address the issue. Petitioner acknowledges this, noting (Pet. 16) that "[t]he present case presents the situation discussed but not decided in *Sears Roebuck*."

when the General Counsel has decided to issue a complaint, the Board properly deems the underlying conduct to be "arguably" protected by the Act.[8] Pet. App. 36a.

Petitioner contends (Pet. 17-18) that, to avoid any issue regarding whether the Board's *Loehmann's Plaza* rule deprives it of its "constitutional right of access to the courts," the Act should be construed to prohibit the Board's rule. Instead, petitioner proposes to construe the Act to require the General Counsel "to present evidence for a court to determine whether the union's conduct is 'arguably protected' by the Act, or to proceed to a Board hearing on the complaint and seek a cease and desist order or other appropriate relief if the allegations are decided in its favor." Pet. 18.

The Board's approach, however, does not "raise serious constitutional problems," regarding petitioner's right of access to the courts, and there is no reason to "construe the statute to avoid such problems." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Under settled preemption principles, when there is an available forum before the Board (subject, of course, to judicial review) for the resolution of federal rights, a

[8] Petitioner suggests (Pet. 15, 17-18) that *Davis* requires a "neutral third party" to make the determination whether the conduct in issue is "arguably protected" by Section 7 and implies that the "third party" must be a court. Nothing in *Davis*, however, requires that the party making the determination be a court rather than the Board's General Counsel. Although *Davis* itself involved a union that had not filed a charge with the Board, but instead was seeking to persuade a court that the tort suit filed against it by a discharged employee was preempted, the General Counsel is, if anything, better situated to make the determination of arguable protection, because of his familiarity with governing federal labor law principles.

state court has no authority to entertain a suit to enjoin conduct that is "arguably" protected by the Act. *Garmon*, 359 U.S. at 245; *Sears*, 436 U.S. at 200-207. It follows that a litigant has no constitutional right to invoke the state processes that are preempted. Applying that principle as the Board has done in *Loehmann's Plaza* does not impair the constitutional right of access to the courts recognized in *Bill Johnson's*, 461 U.S. at 741, because the Court expressly noted in that case that it was "not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption." *Id.* at 737 n.5.

2. Petitioner contends (Pet. 18-23) that the Board erred in finding that petitioner discriminatorily refused to allow the picketers access to its property, in violation of Section 8(a)(1). Petitioner's challenge to the Board's finding, however, raises at most a fact-bound issue that does not warrant further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, petitioner's contention is without merit.

Petitioner does not dispute that, as the Board held here, "an employer may validly post his property . . . if [it] does not discriminate against the union by allowing other distribution." Pet. App. 40a (quoting *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)); see also *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847 (1992) (reiterating non-discrimination principle of *Babcock*). The court of appeals applied that principle in affirming the Board's finding of anti-union discrimination by petitioner. As the Board noted, both before and during the time that petitioner refused to allow employee supporters of Local 23 to picket and handbill in front of the store, it allowed other organizations unlimited access to its property for sales and solicitations, and petitioner permitted the Steelworkers to utilize its facility for orga-

nizing purposes. Pet. App. 40a-41a; 31a-32a. Under those circumstances, the court of appeals correctly concluded that petitioner's "discriminatory behavior was particularly egregious." *Id.* at 31a.

Petitioner argues (Pet. 21) that its actions amounted to "legitimate time, place, and manner restrictions on the conduct at issue." That argument is without merit. Although petitioner initially permitted two picketers access to a limited portion of the parking lot (Pet. 21; Pet. App. 109a), it did not allow them access to the sidewalk in front of the store, an area to which it allowed other organizations unlimited access. Pet. App. 40a-41a. Moreover, petitioner later threatened picketers attempting to enter the parking lot with arrest, and summoned law enforcement officials to the facility. *Id.* at 41a-42a. These facts belie petitioner's contention (Pet. 21) that it was "concerned not about access per se, but the scope of that access." Petitioner's aim was to deny all access to its property to the employees who were picketing and handbilling in support of Local 23, and, as the Board found, petitioner's denial of that access discriminated against protected activity.[9]

3. Contrary to petitioner's contention (Pet. 24-29), the Board's exclusion of the 11 "dual function" employees

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[9] There is no merit to petitioner's suggestion (Pet. 23) that "the effect of the rulings below would be to require [p]etitioner to passively stand by in the face of trespass and mass picketing aimed at its customers that causes disruption to its business." As the Board held, an employer may impose valid restrictions upon access to its property so long as it enforces those restrictions in a non-discriminatory manner. Pet. App. 40a. Moreover, the ALJ found that "it was not demonstrated on this record that the pickets and handbillers acted in an obstructive manner or otherwise conducted themselves in any way but a peaceful manner." *Id.* at 176a.

from the Hempfield bargaining unit was reasonable and presents no issue warranting review by the Court.

In the midst of Local 23's organizing campaign, petitioner imported some workers from its Greensburg store to perform the same jobs at the Hempfield store—nine on a part-time, and two on a temporary, basis. The ALJ excluded these 11 employees from the Hempfield bargaining unit on the ground that they did not share a sufficient "community of interest" with the employees in that unit. Pet. App. 189a-191a. The Board affirmed that decision, explaining that the 11 employees "remained under the primary supervision of their Greensburg store supervisors and spent the majority of their working hours at the Greensburg store," and further that they were "in the Greensburg unit the Steelworkers represent and they are expressly covered by the existing collective-bargaining agreement between the [petitioner] and the Steelworkers." *Id.* at 44a. The court of appeals agreed with the Board that, on the facts presented, the 11 employees' "primary community of interest was with the Greensburg unit," and that, as they were represented by the Steelworkers, it would be "incongruous for them to be represented simultaneously by [Local 23]." *Id.* at 18a-19a.[10]

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[10] The court of appeals observed that, if these employees were placed in the Hempfield unit, it would be unclear whether "the Steelworkers or Local 23 represent[s] them in disputes over vacation time and insurance, not to mention over work assignments and transfer policy." Pet. App. 19a. The court added that, in such a situation, "[t]he employer would constantly face the threat of breaking the law by bargaining with the wrong representative," and the employees "would have to join two unions, pay dues twice, attend two sets of meetings, and somehow split their allegiance." *Ibid.* (quoting *Bentson Contracting Co.* v. *NLRB*, 941 F.2d 1262, 1266 (D.C. Cir. 1991)).

There is no merit to petitioner's contention (Pet. 24) that the Board's decision is "unsupported by a clearly defined analysis and * * * cannot be squared with the Board's 'well-established precedent.'" In *Berea Publishing Co.*, 140 N.L.R.B. 516 (1963), the Board refused to draw a "distinction between the part time employee, who may not work for more than one employer, and the employee who performs dual functions for the same employer," and also rejected a strict rule excluding any dual function employee who did not spend more than 50 percent of his or her time working in the unit. Neither *Berea* nor the other cases cited by petitioner (Pet. 25), however, involved a situation where, as here, the employees sought to be included in a second bargaining unit were already covered by a collective bargaining agreement with another union in the first bargaining unit in which the employees worked. Where that circumstance occurs, the Board, as here, has excluded the dual function employee from the second bargaining unit. See *Otasco, Inc.*, 278 N.L.R.B. 376 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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